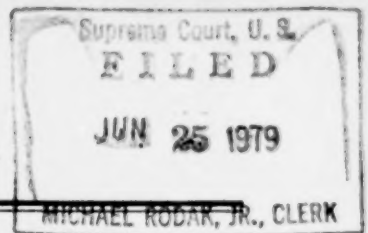


No. 78-1771



IN THE
Supreme Court of the United States
October Term, 1979

FRED WEIBEL, *Petitioner,*

vs.

EMORY T. CLARK d/b/a THE CLARK BUILD-
ING and THE WISCONSIN DEPARTMENT OF
INDUSTRY, LABOR AND HUMAN
RELATIONS, *Respondents.*

BRIEF OF RESPONDENT EMORY T. CLARK
d/b/a THE CLARK BUILDING IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF
WISCONSIN

ROGER C. MINAHAN
RICHARD G. CHANDLER

MINAHAN & PETERSON, S. C.
1260 Marine Plaza
Milwaukee, Wisconsin 53202

Attorneys for Respondent
Emory T. Clark d/b/a
The Clark Building

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OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is set out in petitioner's appendix, p. 1. The opinion of the Circuit Court of Dane County, Wisconsin, is set out in petitioner's appendix, p. 13. The findings of fact and decision of the Appeal Tribunal of the Wisconsin Department of Industry, Labor & Human Relations are set out in respondent's appendix, p. 1, and the decision

of the Wisconsin Industry, Labor & Human Relations Commission is set out in respondent's appendix, p. 3.¹

STATEMENT OF THE CASE

Petitioner was employed as a building engineer by respondent Emory T. Clark d/b/a The Clark Building from 1967 until March 20, 1975, when he was discharged from employment for stealing candy from one of the tenants of the building, Heinemann's Restaurant. He was informed of the reason for his discharge at that time.

After his discharge, petitioner applied for unemployment compensation. The Clark Building objected to payment of benefits because petitioner had been discharged for misconduct. On May 22, 1975, petitioner appeared before an adjudicator of respondent the Department of Industry, Labor & Human Relations of the State of Wisconsin (the "Department"), who denied petitioner's claim in a decision on June 4, 1975.

Petitioner appealed this decision. A hearing on his claim before an Appeal Tribunal of the Department was held on August 8, 1975. Petitioner's attorney moved to adjourn that hearing on the ground that petitioner had not been informed of the specific nature of the charges against him. The motion was denied because the testimony showed that petitioner knew that he had been discharged for stealing candy from Heinemann's. Petitioner's claim for benefits was denied by the Appeal Tribunal and this decision was affirmed by the Industry, Labor & Human Relations Commission.

¹ References to petitioner's appendix will be cited (P.A.) and references to respondent's appendix will be cited (R.A.).

Petitioner sought review of the Department's decision in the Circuit Court of Dane County, alleging among other things that he had been denied due process because he did not have adequate notice of the charges against him. The Circuit Court upheld the Department's decision, finding that there had been no denial of due process. An appeal from that decision was taken to the Supreme Court of Wisconsin which affirmed.

ARGUMENT

The Supreme Court of Wisconsin Has Decided the Due Process issue in Accordance with Applicable Decisions of the Supreme Court of the United States; There Is No Reason to Review That Decision.

The petition for review on writ of certiorari should not be granted because petitioner's claim of denial of due process has been fully considered by the Supreme Court of Wisconsin and decided in accordance with the applicable decisions of this Court. Petitioner states no reason why that decision should be reviewed under Rule 19 of the Rules of the Supreme Court of the United States.

In its decision, the Supreme Court of Wisconsin recognized that several due process rights must be accorded in any quasi-judicial administrative action: (1) the right to seasonably know the charges; (2) the right to meet the charges by competent evidence; and (3) the right to be heard by counsel. (P.A. 5) It stated that the Supreme Court of the United States has held that the right to be heard has little meaning unless one is given adequate notice of the charges to be considered at the hear-

ing. (P.A. 5-6) It also said that despite any apparent inadequacy of notice, a party claiming denial of due process can only prevail if he shows he has been prejudiced as a result of the inadequate notice. (P.A. 7)

In this case, the facts showed that petitioner knew the specific reason for his discharge. Petitioner's written statement, prepared and delivered to the Unemployment Office in the presence of counsel, acknowledged that he knew why he was discharged. He was told he had been seen stealing candy the day before his discharge.

At the Department's hearing on August 8, 1975, petitioner admitted he had been told he was discharged for stealing candy. Four other witnesses at that hearing testified that petitioner told them he knew he was discharged for stealing candy.

Applying the law to these facts, the Supreme Court of Wisconsin held that there had been no denial of due process because petitioner was fully aware of the specific reason for his discharge and could not be prejudiced by any failure to apprise him of something he already knew. (P.A. 8) There is nothing in the petition for certiorari to indicate that the Wisconsin court either ignored or misapplied the relevant law on the due process issue.

Petitioner alleges he was refused entry into the files of the Department and that he made demands for the specifics of the charge prior to the Department's hearing on August 8, 1975.

Petitioner made the same allegations to the circuit court and the Department submitted affidavits contesting them. The circuit court declined to consider the allegations because there was nothing in the record to support the charges, holding that a party is precluded at trial

from offering evidence which was not offered before the Department. The circuit court's decision on this issue was upheld by the Supreme Court of Wisconsin. (P.A. 10-11)

Petitioner also argues that because testimony at the Department's hearing mentioned other incidents of theft, it was not clear whether he was discharged for a single incident or a course of misconduct.

The testimony at the hearing all related to the theft of candy in March 1975, the specific act for which petitioner was discharged. The other incidents of theft were mentioned only to establish that it was reasonable for petitioner's employer to give credence to the report that petitioner had been caught stealing candy.

Petitioner implies that respondents argued that no notice of the charges against him was necessary because of his confession. No such argument was made. Respondent's argument, accepted by the circuit court, was that petitioner's admissions to several people that he had committed the theft and was therefore dismissed showed he knew the specific reason for his dismissal.

Finally, petitioner claims that had he had notice of specific charges he would have presented additional evidence at his hearing. The Supreme Court of Wisconsin dismissed this contention, saying that petitioner failed to point to any evidence he was prevented from producing as a result of his alleged lack of knowledge and that the evidence petitioner did produce indicated that he was well prepared to contest the particular act of misconduct for which he was discharged. (P.A. 9)

Petitioner was fully aware of the specific reason for his discharge. He had full opportunity to meet the

charges against him. In accordance with applicable decisions of this Court, the Supreme Court of Wisconsin properly concluded that petitioner was not denied due process.

CONCLUSION

For the reasons stated above certiorari should not be granted.

Respectfully submitted,

ROGER C. MINAHAN
RICHARD G. CHANDLER

MINAHAN & PETERSON, S. C.
1260 Marine Plaza
Milwaukee, Wisconsin 53202

*Attorneys for Respondent
Emory T. Clark d/b/a
The Clark Building*

APPENDIX

FINDINGS OF FACT AND DECISION OF APPEAL TRIBUNAL

(Formal parts omitted)

The employe worked for approximately ten years as a building engineer for the employer, a commercial and office building. His last day of work was March 19, 1975 (week 12).

On his last day of work, the employe was observed taking candy easter eggs from a counter on the premises of one of the employer's tenants. The store was closed at the time and he did not have permission to take the candy eggs. The employer's manager was informed of the theft and the employe was subsequently discharged on March 20, 1975 (week 12).

The employe maintained that he did not take the candy easter eggs. However, he was observed taking the eggs and putting them inside his shirt. He subsequently admitted to several representatives of the employer's tenant that he had in fact taken the eggs.

Under the circumstances, the actions of the employe in taking property from one of the employer's tenants without permission, evinced a wilful, intentional and substantial disregard of the employer's interests and of the standards of conduct that the employer had a right to expect of him.

The appeal tribunal therefore finds that the employe was discharged in week 12 of 1975, for misconduct connected with his employment, within the meaning of section 108.04(5) of the statutes.

App. 2

DECISION

The department deputy's initial determination is affirmed. Accordingly, benefits are denied based on employment with the employer and the employee is also ineligible for benefits, based on employment by previous employers, in weeks 12 through 15 of 1975.

APPEAL TRIBUNAL

By /s/ John D. Winderl
John D. Winderl, Examiner

App. 3

DECISION OF INDUSTRY, LABOR AND
HUMAN RELATIONS COMMISSION

(Formal parts omitted)

Pursuant to the timely petition for review and request for further hearing filed in the above captioned matter, the commission has reviewed the applicable records and evidence and finds that the appeal tribunal's findings of fact are supported thereby.

DECISION

The employee's request for further hearing is denied and the decision of the appeal tribunal is affirmed. Accordingly, benefits are denied based on employment with the employer and the employee is also ineligible for benefits, based on employment by previous employers, in weeks 12 through 15 of 1975.

Dated and mailed Industry, Labor and
Human Relations Commission

December 19, 1975 /s/ Virginia B. Hart
/s/ John C. Zinos